NO. 45999-0-II

COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON

CANNATONICS, DR. CHAMBERS, LLC,

and

T-TOWN, JOH SERVICES, LLC,

Appellants,

vs.

THE CITY OF TACOMA,
a Washington municipal corporation,

Respondent.

CITY OF TACOMA'S RESPONSE BRIEF

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I. INTRODUCTION

This Court is asked to decide whether a first class city, such as the City of Tacoma, has the authority to declare that certain activities are a public nuisance. The Tacoma City Council determined that it is in the best interests of the health, safety, and welfare of its citizens to declare that medical[1] marijuana collective gardens[2] operating within 600 feet of certain areas such as schools, daycares, or parks, are a nuisance per se. Tacoma Municipal Code (TMC) 8.30.045.C.5. The Court of Appeals has already established that marijuana collective gardens are not legal under state law, and that that a local jurisdiction may ban them outright. Cannabis Action Coalition v. City of Kent, 180 Wn. App. 455, 322 P.3d 1246 (2014), rev. granted.

Petitioners Cannatonics, Dr. Chambers LLC and T-Town, JOH Services, LLC challenge the City Council's determination about what constitutes a threat to public health and safety, and what is a nuisance per se. Cannatonics and T-Town argue that the background facts upon which the City Council relied when enacting TMC 8.30.045 were incorrect, that

[1] The City will use "marijuana" and "cannabis" interchangeably throughout this brief.

[2] RCW 69.51.A.085 defines a collective garden as meaning two to ten qualifying patient, with three or more patients growing up to 45 plants, collectively possessing up to 4 ½ pounds of marijuana. No marijuana from the collective garden may be delivered to anyone other than one of the qualifying patients participating in the collective garden. The City never investigated or determined whether Cannatonics or T-Town were truly collective gardens.

the ordinance violates substantive due process, and is thus invalid. Essentially, they argue that the City Council made the wrong policy choice in enacting TMC 8.30.045 when it sought to limit the operation of marijuana collective gardens near areas such as schools, daycare facilities and public parks.

The City respectfully requests that this Court deny the appeal, affirm both the Hearing Officer and superior court in finding that the locations of Cannatonics and T-Town constitute a nuisance, and uphold the validity of TMC 8.30.045.

II. STATEMENT OF THE CASE

Faced with a proliferation of medical marijuana operations in the City of Tacoma, as well as a variety of related community impacts from the use of marijuana, in July 2012 the Tacoma City Council unanimously enacted TMC 8.30.045, which outlined a framework to enforce against certain marijuana operations under the City's Nuisance Code. (Attached for the Court's convenience is a copy of Ordinance No. 28083 which enacted TMC 8.30.045[3]). The City established its enforcement strategy and determined that a medical collective garden located within 600 feet of any of the following would constitute a nuisance per se (1) public or

[3] The City amended TMC 8.30.045 since it it was originally enacted and issued notices of violation to Cannatonics and T-Town. However, those amendments have no bearing on this case.

private elementary or secondary school, (2) daycare, nursery, or preschool, (3) park, (4) library, (5) drug rehabilitation facility, substance abuse facility, or detoxification center, or (6) drop-in center for youth. TMC 8.30.045.C.5.[4]

Both T-Town and Cannatonics identify themselves as collective gardens and provide medical cannabis to patients.[5] CP 29-30, 31, 130. They are both located within 600 feet of at least one sensitive area. Cannatonics is located within 600 feet of two parks, and T-Town is within 600 feet of a daycare. CP 31, 130-31.

Upon receiving complaints about both operations, and following inspections by City staff to confirm that medical marijuana operations were occurring, the City issued both Cannatonics and T-Town Notices of Violation for operating marijuana collective gardens within 600 feet of a sensitive area, in violation of TMC 8.30.045.C.5. CP 72-73, 158-59.

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[4] The City has the authority to change its enforcement strategy related to medical marijuana operations, up to and including banning them. Cannabis Action Coalition, 180 Wn. App. at 470.

[5] Neither Cannatonics nor T-Town assigns error to any finding of fact. Brief of Appellant, pages 1-3. Thus, the Hearing Officer's and the superior court's findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Cannatonics and T-Town appealed the Notices of Violation to the City's Hearing Officer. TMC 8.30.100. After a hearing in both cases, the City's Hearing Officer affirmed the Notices of Violation issued against both, finding that Cannatonics is within 600 feet of two parks and T-Town is within 600 feet of a daycare. CP 151-56, 486-91. Cannatonics and T-Town were given the option to change their business model or move locations.

Cannatonics and T-Town each appealed the Hearing Officer's decision to the Pierce County Superior Court. In a consolidated case under the Land Use Petition Act, RCW 36.70C, the superior court upheld the Hearing Officer's decision. CP 584-586. This appeal follows.

III. ARGUMENT

Cannatonics and T-Town (collectively referred to as "Cannatonics") have shifted their argument over time. Before the City's Hearing Officer and the Superior Court, Cannatonics argued, in part, that TMC 8.30.045 was invalid "as applied." CP 307-312. Cannatonics has abandoned that argument. Now, Cannatonics now appears to focus solely on a facial challenge to TMC 8.30.045.

Cannatonics argues that the TMC 8.30.045 is based on erroneous background facts, violates their substantive due process rights, and is

vague and overbroad. Cannatonics cannot prevail because they cannot prove beyond a reasonable doubt that TMC 8.30.045 is unconstitutional.

A. STANDARD OF REVIEW

Because the issue in this case relates to the City's enforcement of its ordinances regulating the use of real property, the Land Use Petition Act (LUPA hereinafter) applies. RCW 36.70C.020(2)(c). Judicial review of land use decisions is governed by LUPA. RCW 36.70C.030. Cannatonics does not challenge this.

An appellate court is in the same position as the superior court when reviewing a LUPA petition. Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 742, 317 P.3d 1037 (2014). Although not articulated by Cannatonics, it appears they challenge the superior court's decision under RCW 36.70C.130(1)(f), that the "land use decision violates the constitutional rights of the party seeking relief." Regardless of which subsection Cannatonics cites under LUPA, the City prevails.

B. TMC 8.30.045 IS A VALID EXERCISE OF THE CITY'S AUTHORITY.

1. TMC 8.30.045 is presumed constitutional and Cannatonics has the burden of proving otherwise.

As a first-class charter city organized pursuant to Article XI, §10 of the Washington State Constitution, the City of Tacoma is vested with

broad legislative powers. Heinsma v. City of Vancouver, 144 Wn.2d 556, 560, 29 P.3d 709 (2001). Municipal ordinances are presumed valid and constitutional. Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 602, 94 P.3d 961 (2004). "Every presumption must be indulged in favor of validity." City of Seattle v. Montana, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996). Moreover, courts give considerable weight to the statutory interpretation by the party designated to implement the statute. Heinsma, 144 Wn.2d at 566.

The party challenging an ordinance bears the heavy burden of proving it unconstitutional beyond a reasonable doubt. Erickson & Assocs. v. McLerran, 123 Wn.2d 864, 869, 872 P.2d 1090 (1994). Facing this high standard, Cannatonics has not established beyond a reasonable doubt that TMC 8.30.045 is unconstitutional.

2. As a first class city, the City has broad authority to declare what constitutes a nuisance.

It is long-established in Washington that a first class city, such as the City of Tacoma, has the authority to "declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist." RCW 35.22.280(30). Specifically related to medical cannabis, state law authorizes a city to "adopt and enforce any of the following pertaining to the production, processing, or

dispensing of cannabis or cannabis products within their jurisdiction: ... health and safety requirements...." RCW 69.51A.140.

Moreover, the City has broad police powers to protect the health, safety and welfare of its citizens. Article XI, § 11 of the Washington State Constitution provides that any city "may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

The City's police power is broad. "It is universally conceded to include everything essential to the public safety, health, and morals...." Weden v. San Juan County, 135 Wn.2d 678, 691, 958 P.2d 273 (1998) (emphasis in original; citation omitted). The police power is firmly rooted in the history of this state, and its scope has not declined. Weden, 135 Wn.2d at 692.

A city may regulate a wide variety of activities, *even if the activities are wholly legal.* For example, a city may regulate when personal water crafts are used (Weden, 135 Wn.2d at 678), how and when a dance hall may operate (Bungalow Amusement Co. v. Seattle, 148 Wash. 485, 269 P. 1043 (1928), and it can prohibit card rooms in its jurisdiction. (Edmonds Shopping Ctr. v. Edmonds, 117 Wn. App. 344, 71 P.3d 233 (2003). Cities regulate noise from construction sites (TMC 8.122.090; Seattle Municipal Code (SMC) 25.08.425), and nightclubs

(TMC 8.122.100; SMC 25.08.501), and cities can limit the number of animals a person may have (SMC 23.42.052; TMC 5.30). These activities are not unlawful or improper in and themselves, but under certain circumstances, they impact the surrounding community. As a result, the City may impose reasonable regulations on these activities.

Moreover, a city may choose to limit the locations of certain activities and uses. Indeed, requiring certain uses to maintain a certain distance from other uses and activities is not uncommon. See e.g. TMC 13.06.525; SMC 23.49.030; Everett Municipal Code 39.025 (Adult uses); 13.06.550 (Work release centers). Zoning codes also generally restrict certain uses. See e.g. TMC 13.06.100 (Residential districts); 13.06.200 (Commercial Districts). As such, Cannatonics' insistence that medical marijuana collective gardens are legal, despite a published appellate court decision to the contrary, has no bearing on whether the City can regulate them.

In determining an enforcement strategy and enacting TMC 8.30.045, the City Council, acknowledged there may be a benefit from the use of medical cannabis, but also recognized that places where medical cannabis is offered present:

> 1) issues of public safety and odor for surrounding properties, as well as for the property on which the uses and/or facilities exist; and 2) issues of public welfare and the protection of minors when located near schools, daycare facilities, parks, libraries, youth centers, drug treatment facilities, and other lawful uses.

See Ordinance No. 28083. With these issues in mind, the City Council enacted Nuisance Code provisions related to medical cannabis, stating its purpose as following:

> The production, manufacture, processing, delivery, distribution, possession, or use of cannabis for medical purposes for which there is an affirmative defense under state law may be a nuisance by unreasonably annoying, injuring, or endangering the comfort, repose, health, or safety of others; by being unreasonably offensive to the senses; by being an unlawful act; by resulting in an attractive nuisance; or by otherwise violating the municipal code or state law.

TMC 8.30.045.A.

Given this purpose, the City addressed medical cannabis by declaring that certain specific activities constitute a nuisance. For example, if a medical collective garden allowed anyone under the age of 18 to be present, a nuisance exists. TMC 8.30.045.C.6. If cannabis is visible to the public, a nuisance exists. TMC 8.30.045.C.3. Operating a collective garden within 600 feet of a sensitive area such as a park, school, library, or daycare, is also a nuisance per se. See TMC 8.30.045.C.5.

In this case, by declaring that marijuana collective gardens operating within 600 feet of specific areas--such as schools, libraries,

parks and daycares--are a nuisance, the Council sought to protect and insulate children from the secondary effects of medical marijuana activities. The Council's policy decision to do so is squarely within the scope of its broad police powers, and is a reasonable exercise of that power.

The City's ordinance is a far cry from how Cannatonics characterizes it, i.e., that this "ordinance declares that essentially every aspect of the use, production and dispensing of medical marijuana...is a public nuisance" and "the promotion of misguided attitudes of morality." Brief of Appellant, pp. 4-5, 19, 21. This characterization of the ordinance is simply inaccurate. Under the City's current enforcement strategy, the City simply declared medical marijuana collective gardens to be a nuisance per se if located within 600 feet of only six (6) general areas—(1) a public or private elementary or secondary school; (2) a daycare, nursery, preschool, or child care center; (3) a public park; (4) a library; (5) a drug rehabilitation facility, substance abuse facility, or detoxification center; or (6) a drop-in center for youth.

In fact, the City has the authority to ban all collective gardens, instead of determining certain locations to be a nuisance. In a published appellate case apparently overlooked by Cannatonics, the Court of

Appeals ruled that a city may outright ban collective gardens. Cannabis Action Coalition v. City of Kent, 180 Wn. App. 455, 322 P.3d 1246 (2014) review granted.[6] The Court in that case clarified that medical collective gardens and the use of medical marijuana is illegal, even though someone using medical marijuana may be able to assert an affirmative defense. 180 Wn. App. at 470 (holding that "the plain language of ESSSB 5073, as enacted, does not legalize medical marijuana or collective gardens.")

The City's broad police powers and authority to declare what constitutes a nuisance, is unchallenged by Cannatonics and mandates a conclusion that TMC 8.30.045 is valid.

C. THE CITY'S ORDINANCE IS WHOLLY CONSISTENT WITH THE DUE PROCESS CLAUSE.

Cannatonics argues that TMC 8.30.045 violates its substantive due process rights. Cannatonics' argument is without merit.

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[6] Cannatonics' reliance on an unpublished and overturned federal district court case, United States v. Kynaston, 2012 U.S. Dist. Lexis 189691, to argue that one federal judge believes that medical marijuana is legal under state law is inappropriate. Brief of Appellant, p. 23. First, Cannatonics omits a key statement in the judge's ruling: "The [2011] amendment [to RCW 69.51A] decriminalizes the possession, use, and manufacture of medical marijuana *so long as certain criteria are met.*" CP 323 (emphasis added). But importantly, Cannatonics fails to cite to the 9th Circuit's decision overturning the Eastern District Court's motion to suppress. United States v. Kynaston, 534 Fed. Appx. 624 (9th Cir. 2013). As a result, even if an Eastern District Court's Order on a motion to suppress had any persuasive value in the first place, it now has none since it has been overruled.

The due process clause of the Fourteenth Amendment guarantees that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Washington state constitution similarly guarantees that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Wash. State Const. art. I, § 3. Although the language of Article I, § 3 is not identical to that of the Fourteenth Amendment, Washington courts have treated our state due process clause coextensively with its federal counterpart. State v. Jordan, 180 Wn.2d 456, 461-462, 325 P.3d 181 (2014). Moreover, Cannatonics fails to offer any analysis under State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), so the City will analyze their claim on federal grounds only.

1. Cannatonics' argument that the ordinance requires a heightened scrutiny analysis is misplaced.

Cannatonics' attempt to apply a strict scrutiny analysis must be rejected. The Courts have identified those personal activities and decisions "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected" as fundamental interests under the due process clause. Wash. v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). In a long line of cases, the United States Supreme

Court has held that, the "liberty" specially protected by the due process clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to marital privacy and to use contraception, Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 510 (1965); and to abortion, Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); and to refuse unwanted lifesaving medical treatment. Cruzan v. Missouri Department of Health. et al., 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

But courts have "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). No court has held that a fundamental right is implicated when a city code declares that an illegal medical cannabis operation sited in a certain location is a nuisance. This Court should likewise decline to extend due process protection for fundamental liberties to the facts of this case.

Cannatonics broadly states that "TMC 8.30.045 unconstitutionally intrudes into the penumbra of privacy attendant to the relationship

between health care providers and patients by regulating away patients' ability to implement medical care recommended by their health care provider." Brief of Appellant, p. 15. Such a claim simply mischaracterizes the ordinance.

TMC 8.30.045 says nothing about health care providers, communication between such providers and their patients, and does not address how or when patients can obtain medical marijuana. TMC 8.30.045 simply declares a nuisance when medical marijuana collective gardens operate within 600 feet of six identified areas. Because TMC 8.30.045 does not impact a fundamental liberty interest or right, the proper analysis is whether the ordinance is rationally related to a legitimate governmental interest.

2. TMC 8.30.045 is rationally related to the City's interest, and does not violate Cannatonics' substantive due process rights.

The United States Supreme Court holds that "where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for a determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision." Standard Oil Co. v. City of Marysville, 279 U.S. 582, 584, 49 S. Ct. 430, 73 L. Ed. 856 (1929). An ordinance or statute will satisfy substantive due process standards if it (1) is aimed at

achieving a legitimate public purpose, (2) uses means to achieve that purpose that are reasonably necessary and (3) not unduly oppressive upon individuals. Goldblatt v. Hempstead, 369 U.S. 590, 594-95, 82 S. Ct. 897, 8 L. Ed. 2d 130 (1962); Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 330, 787 P.2d 907 (1990).

In applying the substantive due process test, the Court gives "deference to legislative policy decisions." Guimont v. Clarke, 121 Wn.2d 586, 609, n.10, 854 P.2d 1 (1993). "If the court can reasonably conceive of a state of facts warranting legislation, those facts will be presumed to exist." Jones v. King County, 74 Wn. App 467, 478, 874 P.2d 853 (1994). The burden is on Cannatonics to show that TMC 8.30.045 is so unrelated to the achievement of a legitimate purpose that it is arbitrary or obsolete. Seeley v. State, 132 Wn.2d 776, 813, 940 P.2d 604 (1997).

Cannatonics claims that the City's ordinance describing secondary effects of medical marijuana "is overwhelmed by the unspoken cascade of evidence that" no secondary effects exist. Brief of Appellant, p. 17. 21. Notably, Cannatonics does not cite to *any* evidence whatsoever to support their claims that the City's Council's concerns are unfounded, much less incorrect. Cannatonics' bald and sweeping conclusory statements are

wholly insufficient to overcome the presumption that the City's Nuisance Code is constitutional.

Here, the City Council has a legitimate governmental interest in protecting children and other citizens from the secondary effects of medical marijuana. Just as the State legislature had an interest in protecting people from second-hand smoke (RCW 70.160.011) even though adults smoking is a legal activity, it is reasonable for the City to protect children and other citizens from effects, such as the smoke, of medical marijuana. Asserting that a nuisance exists when a marijuana collective garden operates within 600 feet of places where children may be present, such schools, daycares and public parks, serves that purpose.[7] The ordinance passes the first two prongs outlined in Presbytery.

Finally, TMC 8.30.045 is not unduly oppressive, and therefore the final prong in Presbytery is satisfied. In examining whether an ordinance is unduly oppressive or burdensome, courts must consider the nature of the harm sought to be avoided, the availability of less drastic measures, and the economic loss suffered by the property owner. Presbytery, 114 Wn.2d at 331.

[7] Indeed, the City's regulations related to the locations of medical cannabis collective gardens are no more unreasonable than RCW 69.50.331(8), which prohibits retail licenses for marijuana producers, processors and retailers operating within 1,000 feet of the perimeters of school grounds, child care centers, public parks, libraries.

Here, the City's current enforcement strategy in TMC 8.30.045 did not outright ban collective gardens—although the City could do so--but instead merely declared that siting collective gardens in certain locations is a nuisance per se. Balanced against the City's interest in protecting children and the public, Cannatonics has not met their burden of proving that the ordinance is unduly burdensome. See e.g. Rhoades v. City of Battle Ground, 115 Wn. App. 752, 63 P.3d 142 (2002) (holding that an ordinance prohibiting exotic animals within the City limits did not violate a resident's substantive due process rights).

Moreover, Washington courts have stated that "it defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm." Weden, 135 Wn.2d at 707; Paradise v. Pierce County, 124 Wn. App. 759, 102 P.3d 173 (2004) (holding an ordinance banning only the gambling aspect of an owner's restaurant was not unduly oppressive because it was the only activity found to be damaging to the community.) The City's ordinance at issue declares that medical marijuana collective gardens sited in certain limited locations are a nuisance. The nature of the harm sought to be avoided (adverse impacts on children) is a legitimate and substantial concern, especially in light of the fact that the medical marijuana field is wholly unregulated by the state, and that possession and cultivation of marijuana

remains a federal crime. Controlled Substances Act (CSA,) 21 U.S.C. Ch. 13, § 801 *et seq.*

Cannatonics baldly states that the City's Nuisance code declares "virtually all activity related to medical marijuana" a nuisance. Brief of Appellant, p. 32, 35. The City's current enforcement strategy outlined in TMC 8.30.045 does not outright prohibit collective gardens or declare "virtually all activity" related to marijuana a nuisance. Instead, the City chose to proclaim that medical marijuana collect gardens located in certain areas constitute a nuisance per se.

Moreover, marijuana has been illegal under federal law for nearly 100 years, if not longer. United States v. Walton, 514 F.2d 201, 203 (D.C. Cir. 1975). Courts rely on the historical nature and regulation of an activity when considering a due process challenge. See e.g. Edmonds Shopping Ctr. Assoc. v. City of Edmonds, 117 Wn. App. 344, 71 P.3d 233 (2003) (holding that a city may outright card rooms, in part because of the "historical acceptance of the regulation of gambling as a valid exercise of the police power.") In light of the historical acceptance that marijuana is illegal, Cannatonics' constitutional challenge must fail.

TMC 8.30.045 is aimed at a legitimate public purpose, the means used are reasonably necessary to achieve that purpose, and it is not unduly

oppressive. As a result, Cannatonics cannot prove beyond a reasonable doubt that the ordinance violates their substantive due process rights.

D. THE PROVISION OF TMC 8.30.045 STATING THAT SIGNS ADVERTISING CANNABIS FOR SALE OR DELIVERY IS A NUISANCE IS NOT UNCONSTITUTIONALLY OVERBROAD OR VAGUE.

For the first time on appeal, Cannatonics asserts that TMC 8.30.045.C.10, which declares "any place bearing a sign or placard advertising cannabis for sale or delivery" as a nuisance is unconstitutionally overbroad and vague.[8] Brief of Appellant, p. 39. Cannatonics apparently contends that the provision impacts their First Amendment right to free speech.[9] Neither Cannatonics nor T-Town was ever cited for such a violation because neither their business name nor sign specifically advertised cannabis or marijuana for sale. CP

[8] RAP 2.5(a) prohibits a party from raising an issue for the first time on appeal except when the issue relates to: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. Cannatonics may be raising a constitutional issue, but it is not a "manifest error affecting a constitutional right." See State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (holding that to prove an error is manifest, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequence in the trial of the case.")

[9] To prevail on a free speech claim, even for *legal* commercial speech, Cannatonics must prove that: (1) the communication is neither misleading nor related to unlawful activity; (2) the State does not have a substantial interest to be achieved by restrictions on commercial speech; (3) the restriction does not directly advance the state interest involved; and (4) it is more extensive than is necessary to serve that interest. *See* Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1993). But since medical marijuana operations are illegal, the Court need not reach this issue.

83, 493 (T-Town), 163, 174 (Cannatonics).[10] Cannatonics thus appears to challenge the ordinance on its face. Cannatonics' arguments fail.

1. The sale or delivery of medical marijuana is related to illegal activity and can be regulated or banned by the City.

As stated above, medical cannabis collective gardens are illegal in the State of Washington. Cannabis Action Coalition, 180 Wn. App. at 470. If they are illegal, the City may ban speech related to them.

Assuming that signs offering medical marijuana for sale or delivery can be classified as 'speech,' "then it is speech proposing an illegal transaction, which a government may regulate or ban entirely." Village of Hoffman Estates v. Flipside, 455 U.S. 489, 496, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) citing to Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-4, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1993); see also Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations, 413 U.S. 376, 388, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973) (stating that "We have no doubt that a newspapers constitutionally could be forbidden to publish a want ad proposing a sale of narcotics of soliciting prostitutes.") As in Pittsburgh Press, the City of Tacoma may

[10] The allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule that "the person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." New York v. Ferber, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

regulate, or even ban, the advertising of an illegal medical marijuana collective garden.[11]

2. TMC 8.30.045.C.10 related to signs is not vague.

Similar to its overbreadth challenge, Cannatonics raises a vagueness argument, in a cursory fashion, for the first time on this appeal. Brief of Appellant, p. 40. Such a challenge lacks merit.

First, as stated above, there are no constitutional protections for advertising an illegal activity. Nonetheless, a court will invalidate an ordinance only if the enactment is impermissibly vague in all of its applications. Hoffman, 455 U.S. at 494-495. In other words, "To be struck down for vagueness, a statute or regulation must fail 'to give a

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[11] Even if selling marijuana were legal, the overbreadth doctrine does not apply because the signs deal with commercial speech. Cannatonics admits that the overbreadth doctrine does not apply to commercial speech. Brief of Appellant, p. 39; see also Central Hudson, 447 U.S. 565, n.8 (stating that commercial speech "is not easily deterred by 'overbroad regulation.'") TMC 8.30.045.C.10 states that a nuisance exists for "any place bearing a sign or placard advertising cannabis for sale or delivery." Such advertising an item "for sale" is clearly a purely commercial act. Cannatonics focuses on the word "delivery" in TMC 8.30.045.C.10 to argue that advertising marijuana to others for "delivery" is not a commercial activity, but offers no authority or reasoned argument to support that conclusory assertion. Brief of Appellant, p. 40. Moreover, even if the overbreadth doctrine applied here, "The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep, to justify invalidating the statutes on its face." Washington Mercantile Ass'n. v. Williams, 733 F.2d 687 (9th Cir. 1984). Even if a statute is "substantially overbroad," however, the court will uphold it if it is able to limit its construction in a way that brings it within constitutional bounds. Seattle v. Abercrombie, 85 Wn. App. 393, 397, 945 P.2d 1132 (1997). Assuming the challenged 'speech' in this case was not commercial speech, however, Cannatonics has failed to demonstrate that the ordinance is overbroad.

person of ordinary intelligence fair notice that his contemplated conduct' is forbidden."

Ass'n des Eleveurs de Canards et D'oies du Quebec v. Harris, 729 F.3d 937, 946 (9th Cir. 2013). The fact that some terms in a statute are not defined does not mean the enactment is unconstitutionally vague. Spokane v. Douglass, 115 Wn.2d 174, 180, 795 P.2d 693 (1990).

Here, a reasonable person can readily interpret and comprehend TMC 8.30.045.C.10. That subsection, which provides that a nuisance exists for "Any place bearing a sign or placard advertising cannabis for sale or delivery", means that a sign that says "Marijuana for sale" is a nuisance. A sign that says "Cannabis here!" or "Pot sold here!" is a nuisance. Simply because each term used in the ordinance is not defined does not render it unconstitutionally vague. This subsection gives fair notice to a person of ordinary intelligence of the regulated conduct. As such, Cannatonics cannot prove beyond a reasonable doubt that TMC 8.30.045.C.10 is vague.

IV. CONCLUSION

The authority to enact nuisance ordinances has long resided with first-class cities such as the City of Tacoma. The City's Nuisance ordinance in TMC 8.30.045 is a valid exercise of the City's authority to regulate nuisances within its borders. Cannatonics has failed to overcome

the presumption of constitutional validity. Therefore, the City respectfully requests the Court to affirm the superior court's decision and uphold the validity of TMC 8.30.045.

DATED this 21 day of November, 2014.

ELIZABETH PAULI, City Attorney

By: Debra E. Casp
Debra E. Casparian, WSBA # 26354
Deputy City Attorney

V. APPENDIX

Req. #13304

SUBSTITUTE
ORDINANCE NO. 28083

BY REQUEST OF DEPUTY MAYOR LONERGAN AND COUNCIL MEMBER CAMPBELL

AN ORDINANCE relating to public nuisances; amending Chapter 8.30 of the Tacoma Municipal Code to identify activities related to cannabis that are nuisances.

WHEREAS RCW 35.22.280(30) grants the City extensive power to declare what constitutes a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist, and

WHEREAS RCW 69.51A.140 authorizes cities to adopt and enforce health and safety requirements related to cannabis, including medical cannabis, within their jurisdictions, and

WHEREAS the manufacture, delivery, and possession of cannabis is a crime under local, state, and federal law, and

WHEREAS Initiative Measure No. 692, approved by the voters of Washington state in 1998 and now codified as amended by the Legislature as Chapter 69.51A RCW, created an affirmative defense to cannabis crimes for "qualifying patients" and "designated providers" meeting certain criteria, and

WHEREAS the City does not currently have regulations or requirements for cannabis, except criminal penalties, and

WHEREAS the City acknowledges the needs of persons suffering from debilitating or terminal conditions and the benefits that some qualifying patients experience from the medical use of cannabis, and

WHEREAS the City has seen the establishment of cannabis-related businesses within the City limits that offer cannabis and cannabis products to numerous persons that assert they are operating as designated providers or collective gardens within the meaning of Chapter 69.51A RCW, which businesses are variously referred to as dispensaries, cooperatives, patient cooperatives, or patient networks, and designated as both for-profit and not-for-profit, and

WHEREAS these businesses are illegal under local, state, and federal law, and the City has provided notice to some of these businesses that they must cease illegal activity, and

WHEREAS there is no affirmative defense under Chapter 69.51A RCW for these businesses, and

WHEREAS, as a criminal activity, these businesses endanger the comfort, repose, health, and safety of citizens, and constitute a nuisance, and

WHEREAS RCW 69.51A.085 provides an affirmative defense to qualifying patients participating in a "collective garden" provided that: (1) no more than ten patients participate in the garden; (2) the garden contain no more than 15 plants per patient and no more than 45 plants total; (3) the garden contain no more than 24 ounces of useable cannabis per patient and no more than 72 ounces of useable cannabis total; (4) proof of qualification for all participating patients is

available on the garden premises; and (5) no useable cannabis is delivered to anyone other than the qualified participating patients, and

WHEREAS there is no set limit to the number of collective gardens that may be located at any site, nor any restriction as to where collective gardens may be located in relation to other uses, and

WHEREAS many persons and entities are operating as "collective gardens" with a "business" or "administrative" office at the same location where a dispensary was located and the City believes that cannabis is being delivered at these locations, and

WHEREAS such offices are illegal and constitute a nuisance, and

WHEREAS collective gardens and other production, processing, dispensing, and delivery of cannabis for medical use present: (1) issues of public safety and odor for surrounding properties, as well as for the property on which the uses and/or facilities exist; and (2) issues of public welfare and the protection of minors when located near schools, daycare facilities, parks, libraries, youth centers, drug treatment facilities, and other lawful uses, and

WHEREAS the City must ensure that any potential secondary impacts arising from the operation of collective gardens can be adequately regulated, and

WHEREAS, because there can be no lawful business enterprise associated with these activities, the City is precluded from licensing and/or

otherwise permitting these activities, and as a result cannot use the regulatory tools associated with licensing and permitting, and

WHEREAS, unless regulations declaring certain activities a nuisance are adopted, the City lacks the necessary tools to address the effect on public health, safety, and welfare of collective gardens and other activities relating to cannabis; Now, Therefore,

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That Chapter 8.30 of the Tacoma Municipal Code is hereby amended, as set forth in the attached Exhibit "A."

Section 2. That this ordinance shall become effective as provided by law.

Passed JUL 3 1 2012

Deputy Mayor

Attest:

City Clerk

Approved as to form:

City Attorney

Tacoma

EXHIBIT "A"

CANNABIS PUBLIC NUISANCE CODE AMENDMENT

Amendments to the Public Safety and Morals Code – Chapter 8.30

These amendments show all of the changes to the *existing* text of the Public Safety and Morals Code. The sections included are only those portions of the code that are associated with these amendments. New text is underlined and text that is deleted is shown in ~~strikethrough~~.

Chapter 8.30

PUBLIC NUISANCES

Sections:

* * *

8.30.045 Cannabis.

A. Producing, manufacturing, processing, delivering, distributing, possessing, and using cannabis are crimes under the municipal code, state law, and federal law. Washington state law, Chapter 69.51A RCW, provides an affirmative defense for certain cannabis-related crimes. There is no affirmative defense under federal law. This section is a civil remedy and does not alter or affect any criminal law governing the production, manufacture, processing, delivery, distribution, possession, or use of cannabis.

The production, manufacture, processing, delivery, distribution, possession, or use of cannabis for medical purposes for which there is an affirmative defense under state law may be a nuisance by unreasonably annoying, injuring, or endangering the comfort, repose, health, or safety of others; by being unreasonably offensive to the senses; by being an unlawful act; by resulting in an attractive nuisance; or by otherwise violating the municipal code or state law.

B. Definitions.

1. "Collective Garden" means any place, area, or garden where qualifying patients (as defined in RCW 69.51A.010) share responsibility and engage in the production, processing and/or delivery of cannabis for medical use as set forth in RCW 69.51A.085 and in full compliance with all limitations and

requirements set forth in RCW 69.51A.085. "Collective garden" does not include any office, meeting place, or club associated with a collective garden which is not located within the same structure as the collective garden itself.

2. "Medical Cannabis garden" means any place, area, or garden where a qualifying patient or designated provider (as defined in RCW 69.51A.010) produces or processes cannabis for medical use as set forth in RCW 69.51A.040 and in full compliance with all limitations and requirements set forth in RCW 69.51A.040.

3. "Cannabis garden" means any place, area, or garden where cannabis is produced or processed and either (a) the person producing or processing the cannabis is not a qualifying patient or designated provider or (b) a copy or copies of the valid documentation of the qualifying patient(s) who own or share responsibility for the garden is not available at all times on the premises or (c) the number of plants or useable cannabis on the premises exceeds the limits set forth in RCW 69.51A.040(1)(a), RCW 69.51A.040(1)(b), or RCW 69.51A.085, or the garden is not otherwise in full compliance with RCW 69.51A.040(1)(a), RCW 69.51A.040(1)(b), or RCW 69.51A.085.

4. "Dispensary" means any place where cannabis is delivered, sold, or distributed or offered for delivery, sale, or distribution. Dispensary does not include a private residence where a designated provider delivers medical cannabis to his or her qualifying patient or a private residence where a member of a collective garden delivers medical cannabis to another member of the same collective garden. Dispensary does not include a collective garden, but does include any office, meeting place, club, or other place which is not located within the same structure as the collective garden itself where medical cannabis is delivered regardless of whether the delivery is made to another member of the collective garden.

5. "Cannabis" or "Marijuana" means all parts of the plant Cannabis, commonly known as marijuana, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.

6. The definitions contained in Chapter 69.50 RCW and Chapter 69.51A RCW shall be used to define any term in this section.

C. The following specific acts, omissions, places, and conditions are declared to be a public nuisance, including, but not limited to, any one or more of the following:

1. Any cannabis garden is a nuisance per se.

2. Any dispensary is a nuisance per se.

3. Any place where cannabis is visible to the public or is visible from property owned or leased by another person or entity. This includes smoking cannabis in a manner that it is visible from public property or from property owned or leased by another person or entity.

4. Any place that cannabis can be smelled from a public place or from a property owned or leased by another person or entity.

5. Any collective garden located closer than the distance noted below to any of the following, whether in or out of the City:

a. Within 600 feet of any public or private elementary or secondary school;

b. Within 600 feet of any daycare, nursery, or preschool;

c. Within 600 feet of any park;

d. Within 600 feet of any library;

e. Within 600 feet of any drug rehabilitation facility, substance abuse facility, or detoxification center; or

f. Within 600 feet of any drop-in center for youth.

g. The separation required between the collective garden and other uses identified in this subsection shall be measured from the nearest edge or corner of the property of each use.

6. Any collective garden where any person under the age of eighteen years is present or is permitted to be present.

7. Any collective garden or medical cannabis garden that is not fully enclosed within a structure.

8. Any parcel containing more than one collective garden, medical cannabis garden, or combination of collective garden and medical cannabis garden.

9. Any collective garden or cannabis garden where any violation of Chapter 69.50 RCW occurs and for which the affirmative defense created by Chapter 69.51A RCW would not apply.

10. Any place bearing a sign or placard advertising cannabis for sale or delivery.

11. Any place where any production, manufacture, processing, delivery, distribution, possession, or use of cannabis occurs for which there is not an affirmative defense under state law.

12. Any place other than a private residence where cannabis is smoked or ingested.

* * *

TACOMA CITY ATTORNEY

November 21, 2014 - 2:51 PM

Transmittal Letter

Document Uploaded: 459990-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 45999-0

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Kristin Kropelnicki - Email: tkropelnicki@ci.tacoma.wa.us

A copy of this document has been emailed to the following addresses:

dcasparian@ci.tacoma.wa.us

NO. 45999-0-II

COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON

CANNATONICS, DR. CHAMBERS, LLC,

and

T-TOWN, JOH SERVICES, LLC,

Appellants,

vs.

THE CITY OF TACOMA,
a Washington municipal corporation,

Respondent.

CERTIFICATE OF SERVICE RESPONDENT CITY OF TACOMA'S RESPONSE BRIEF

Debra E. Casparian, WSBA No. 26354
Deputy City Attorney
City of Tacoma
747 Market Street, Room 1120
Tacoma, WA 98402
(253) 591-5887

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

Kristina Kropelnicki, being first duly sworn on oath, deposes and states:

I am a citizen of the United States over the age of 18 and competent to be a witness herein.

On the 21 day of November, 2014, I caused to be served a copy of CITY OF TACOMA'S RESPONSE BRIEF and this CERTIFICATE OF SERVICE on:

Jay Berneburg
705 S. 9th Street, Suite 206
Tacoma, WA 98405
(Via electronic notification and USPS pre-paid mailing)

Court of Appeals, Division II
950 Broadway
Suite 300, MS TB-06
Tacoma, WA 98402-4454
(An original via Electronic filing)

Kristina Kropelnicki

TACOMA CITY ATTORNEY

November 21, 2014 - 2:54 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 45999-0

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■ Other: Certificate of Service

Comments:

No Comments were entered.

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